

March 8, 1989

VIA FACSIMILE TRANSMISSION

Mr. Patrick Sharpe  
Compliance Specialist  
Premerger Notification Office  
Bureau of Competition  
Room 301  
Federal Trade Commission  
Washington, D.C. 20580

Dear Mr. Sharpe:

I am writing pursuant to Section 803.30<sup>802.30</sup> of the Premerger Notification Rules (the "Rules") to request your informal interpretation regarding the application of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Act"), and the Rules to the transactions described below.

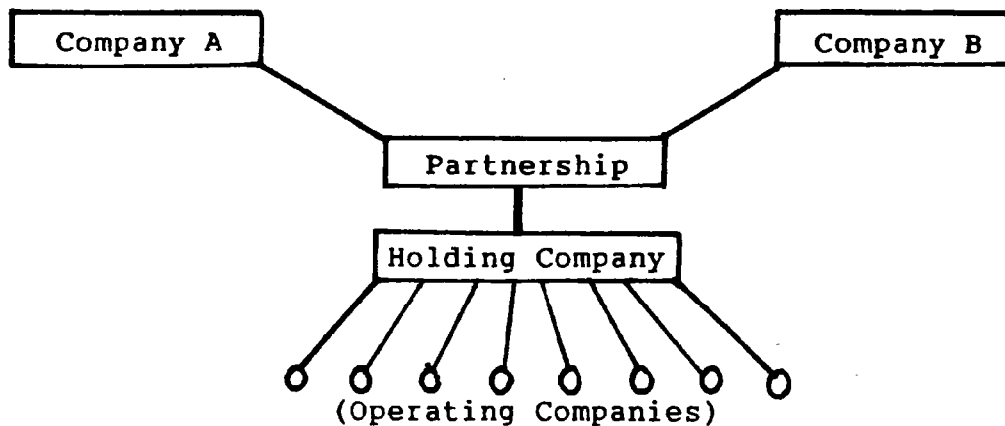
Summary of Business Relationships.

Our client is a general partnership (the "Partnership"). The Partnership has two general partners, Company A and Company B, each of which is a corporation with total assets in excess of \$100 million. No other person has "control" of either Company A or Company B within the meaning of the Act.

Pursuant to the partnership agreement which created the Partnership, each of Company A and Company B directly or indirectly owns a 50% interest in the Partnership and is entitled to receive 50% of the Partnership's profits. In addition, the partnership agreement gives each of Company A and Company B the right to designate 50% of the members of the governing board of the Partnership. The Partnership currently has a wholly-owned subsidiary (the "Holding Company") which serves as a holding company for eight corporations (the "Operating Companies").

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The following diagram reflects the existing business relationships between Company A, Company B, Partnership, Holding Company and the Operating Companies.



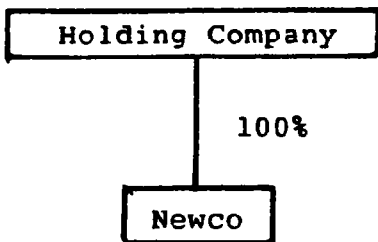
#### Summary of Proposed Transactions.

Company A is presently unable to fund its 50% share of the cash necessary to finance future acquisitions that have been identified by the Partnership. By contrast, Company B presently has sufficient cash to finance a disproportionately large share of such possible acquisitions. After extensive negotiations, Company A and Company B have developed the following interim arrangement (the "Proposal") for financing such possible acquisitions.

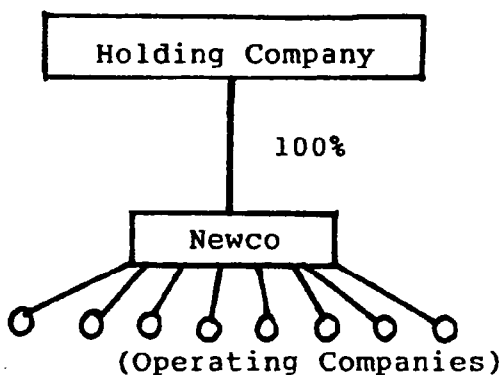
Under the Proposal, Company A and Company B will enter into an agreement (the "Ownership and Governance Agreement"). Pursuant to the Ownership and Governance Agreement, the Partnership will cause Holding Company to form a new, wholly-owned subsidiary ("Newco"), contributing \$1,000 in cash and receiving 100% of the outstanding voting securities of Newco. Holding Company will then contribute all of the stock of the Operating Companies to Newco (the "Stock Contribution"). Following the Stock Contribution, Holding Company will sell 90% of the outstanding voting stock of Newco to Company B for a total consideration of greater than \$15 million. The following diagram reflects the proposed transactions described above.

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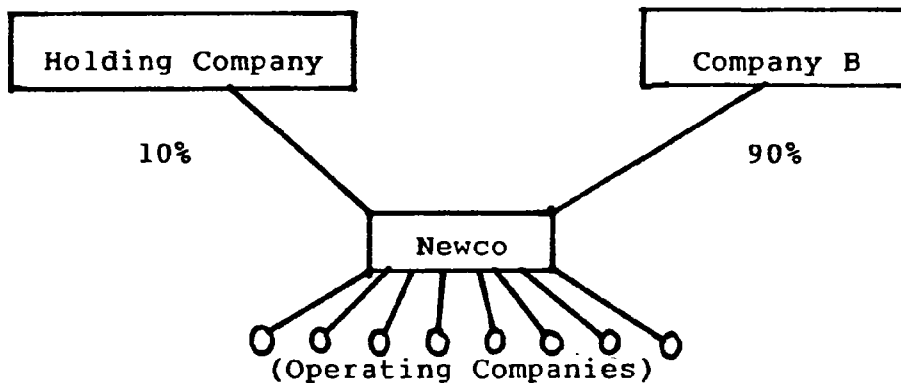
**Step 1: Holding Company forms Newco.**



**Step 2:** Holding Company contributes to Newco all of the voting securities of the Operating Companies.



**Step 3:** Holding Company sells 90% of the voting securities of Newco to Company B.



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For a period following execution of the Ownership and Governance Agreement, Company B will be obligated to finance 90% of the total cost of all acquisitions effected by Newco, while Holding Company will be obligated during the same period to finance the remaining 10% of the total cost of such acquisitions (all such companies acquired by Newco, including those acquired through the Stock Contribution, being hereinafter referred to collectively as the "Covered Companies" or individually as a "Covered Company").

In addition, pursuant to the Ownership and Governance Agreement, Company A will be granted options (the "Purchase Options") to purchase up to a 50% ownership interest in each of the Covered Companies. The Ownership and Governance Agreement will specify that Purchase Options must be exercised in the order in which the Covered Companies are acquired (i.e., on a "first-in, first-out" basis).

The Ownership and Governance Agreement will also give both Company B and the Partnership certain rights to representation on the boards of directors of the Covered Companies. For instance, where the Partnership (indirectly through the Holding Company) and Company B own 100% of a Covered Company, the board seats will be distributed equally between them. Generally, where the Partnership (indirectly through the Holding Company) and Company B own less than 100% of a Covered Company, the Partnership will have more board seats than it would otherwise have given its ownership percentage (10%), but fewer board seats than Company B.

#### Reporting Requirements under the Act.

It appears that the only potentially reportable transaction under the Act is the sale to Company B of 90% of the outstanding stock of Newco (the "Newco Stock Sale"). For the following reasons, we believe the Newco Stock Sale should not be viewed as reportable under the Act.

First, we believe that the Newco Stock Sale should be viewed as exempt under Section 802.30 of the Rules. Section 802.30 exempts any transaction "in which, by reason of holdings of voting securities, the acquiring and acquired persons are . . . the same person . . ." We are aware that the Bureau of Competition historically has taken the position that partnership interests are not "voting securities" within the meaning of the Act, since they typically do not entitle

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their owners to elect persons exercising functions similar to those exercised by directors of corporations. In this case, however, each of Company A and Company B has the right under the partnership agreement to designate 50% of the members of the Partnership's governing board. Furthermore, the basis for distinguishing between partnership interests and voting securities in the context of Section 802.30 seems significantly eroded, given that the current definition of "control" has the effect of treating partnerships substantially as corporations for purposes of determining their ultimate parent entities. Moreover, Company A and Company B could avoid this technicality (and would be willing to do so) by causing the Partnership to distribute the stock of Holding Company to them equally, so that each would "control" Holding Company through the holding of voting securities. It therefore seems anomalous to deprive Company A and Company B of the benefit of the Section 802.30 exemption merely because they technically hold partnership interests rather than voting securities.

Second, no real change in "control" will occur as a result of the Newco Stock Sale. The "acquired person" in the Newco Stock Sale will be Newco. Since Company B has the right to receive 50% of the profits of the Partnership, Company B currently "controls" the Partnership within the meaning of Section 801.1(b)(1)(ii) of the Rules. Company B therefore currently indirectly "controls" Holding Company and the Operating Companies, and prior to the Newco Stock Sale will indirectly "control" Newco. Thus, the acquiring person (Company B) and the acquired person in the Newco Stock Sale will be the same, and no new third party will acquire "control" of Newco as a result of the Newco Stock Sale.

Finally, filing should not be required with respect to the Newco Stock Sale as the information which will be obtained through reporting will not be meaningful. If filing were required with respect to the Newco Stock Sale, as the acquiring person Company B would include in the information reported under Items 5-9 of its Notification and Report Form all of the required information with respect to Newco (since Newco is already included within Company B). Similarly, as the ultimate parent entity of the acquired person, Company B would report under Items 5-9 of its Notification and Report Form only the required information with respect to Newco. While Company A would also be an ultimate parent entity of the acquired person, the information reported by it under Items 5-9 of its Notification and Report Form would be identical to that

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reported by Company B. Consequently, the Notification and Report Forms which would be filed by Company B as the acquiring person and by Company B and Company A as the ultimate parent entities of the acquired person will not disclose any real change in "control" of Newco and would not appear to be meaningful to the Bureau of Competition. We therefore believe that reporting of the Newco Stock Sale should not be required.

As we discussed by telephone today, we would like to receive your interpretive advice by not later than the close of business on Thursday, March 9, 1989. Please feel free to contact me or [REDACTED] respectively, if you have questions or need additional information.

Sincerely yours,  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

Section 802.30 cannot apply when there are two UPE's (50-50) on the acquired side. The B-B transaction is intraperson but the B-A is not. However, <sup>the</sup> C-3 exemption does apply. Go to the statute and you will find that B's acquisition of an issuer of which it owns 50% is exempt. call [REDACTED] 3-9-89 and conveyed the staff's conclusion on this issue